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Supreme Court, U.S.
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92-1356

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

LINCOLN E. SMITH,

Petitioner,

v.

CITY OF BOSTON,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE MASSACHUSETTS SUPREME JUDICIAL COURT

Petition for Writ of Certiorari

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38 pp

Question Presented.

May a directed verdict be entered for a municipality on the basis that it is insulated from liability for political firings because its final policymaker delegated hiring and firing decisions to a subordinate, where the state's Supreme Judicial Court conceded that the evidence showed that the firing was "deplorable" and "illegal"and that the final policymaker had "acquiesced" in the decision in question after personal review of the firing that put the final policymaker on actual notice that the decision was to fire an employee on the basis of that employee's association with a political rival of the policymaker?

List of All Parties.

Petitioner

1. Plaintiff Lincoln E. Smith

Respondent

2. Defendant City of Boston

(Robert Consalvo, the other defendant at trial, dismissed his appeal from the finding of personal liability on his part, and is no longer a party to this proceeding.)

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Petition for Writ of Certiorari

Petitioner respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the Massachusetts Supreme Judicial Court entered in this proceeding on November 5, 1992.

Citations to Opinions Below.

The opinion of the Massachusetts Supreme Judicial Court of Appeals in this proceeding, is reported at 413 Mass. 607, and appears in the Appendix. hereto along with the separate judgment of that court.

Jurisdiction.

This Court's jurisdiction is invoked under 28 U.S.C. § 1257 (a), as rights are claimed under the First and Fourteenth Amendments to the United States Constitution and § 1983 of Title 28 of the United States Code.

Statement of the Case.

The following statement of the case (including the footnotes therein) is taken from the opinion sought to be reviewed, at 413 Mass. 608 to 610, reproduced in the Appendix to this petition at pages A. 2-5:

> From 1977 to 1980, the plaintiff, Lincoln E. Smith, worked as an administrative assistant to a member of the city council (city councillor). From 1982 through June, 1986, Smith was employed as the coordinator of the student employment program by the city. In April, 1986, the mayor of Boston appointed Robert W. Consalvo as director of the office of personnel management for the city

of Boston (director).[1] Consalvo's appointment became effective June 1, 1986, but he immediately assumed the duties and responsibilities of the position. As director, Consalvo was "responsible for the personnel actions of all the [city] employees except those in the school department."[2] Consalvo testified that his primary responsibility was the "hiring and firing" of employees and "the procedures dealing with personnel policy and the like."

Almost immediately after Consalvo became director he began to "harass" Smith because of Smith's association with a city councillor. Consalvo's "harassment" escalated to disparate treatment and intimidation.[3] On June 23, 1986, less than one month after his appointment as

---

[1] Consalvo's position is also referred to as supervisor of personnel.

[2] Consalvo testified that the mayor had hired him "to take over [the] department and restructure it into a modern office of personnel management."

[3] Smith testified that on one occasion Consalvo said to him, "If [the city councillor] wants you employed by the City of Boston, it is not going to be in this department. I suggest that you look elsewhere."

As for the disparate treatment, Smith testified that Consalvo moved him from his North Street office to City Hall, required Smith to submit daily activity reports not required of other employees, and challenged Smith's attendance record.

director became effective, Consalvo fired Smith.[4] Following termination, Smith requested a meeting with the mayor. The meeting was held on June 30, 1986. Smith, Consalvo, the mayor, and the city councillor were present. Smith testified that he recounted at the June 30 meeting the circumstances leading to his termination. Smith further testified that the mayor said "that things would be taken care of," and that "he [the mayor] knew exactly where [Smith] was coming from." Smith testified that the mayor promised to get back in touch with him. The mayor responded by way of his executive assistant who told Smith that "there was a position available at the Boston police department in the personnel unit," and that they would transfer him if he applied for the position.

---

[4] Consalvo asserted that he properly fired Smith for failing to turn in a daily report on Friday, June 20. Smith testified, however, that he prepared the report in the late afternoon and went to Consalvo's office to turn it in at 4:46 P.M. Outside Consalvo's office, Smith said he was met by one of Consalvo's administrative assistants, who informed Consalvo of Smith's arrival and reported back to Smith that Consalvo would be with him shortly.

After waiting until 5:30 P.M. for Consalvo to come out of his office and accept the report, Smith departed for the weekend and left the report on his own desk. On Monday morning, June 23, 1986, Consalvo summoned Smith into his office and terminated him for failing to turn in the activity report.

Thereafter, Smith brought suit against Consalvo, individually and in his capacity as director of personnel, and the city claiming, pursuant to 42 U.S.C. § 1983, and G. L. c. 12, § 11I (1990 ed.), that Consalvo and the city violated his right to be free of reprisals for political association and affiliation guaranteed by the Massachusetts Declaration of Rights and the United States Constitution. At trial, following presentation of the plaintiff's case-in-chief, the trial judge granted the city's motion for a directed verdict on the State and Federal civil rights claims.[5] The matter of Consalvo's individual liability was submitted to the jury. On a special verdict, the jury found that Consalvo violated Smith's civil rights secured by the Massachusetts Declaration of Rights and the United States Constitution, and awarded Smith $137,000 in compensatory damages and $5,000 in punitive damages. Consalvo is not a party to this appeal.

The Massachusetts Supreme Judicial Court found that, as a matter of state law, the Mayor was the only

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[5] The judge also granted the city's motion for a directed verdict on Smith's claims that the city violated its contract with him and negligently failed to prevent Consalvo from engaging in the described course of conduct, and Consalvo's motion for a directed verdict on Smith's claims of intentional infliction of emotional distress and interference with advantageous relations.

relevant final policymaker, and then concluded that

> [T]he record does not support the conclusion that the mayor ratified Consalvo's decision and the basis for it. The circumstances lead us to the conclusion that the mayor, at most, acquiesced in Consalvo's decision. Mere acquiescence in a subordinate's decision will not subject the municipality to liability because the governmental policy itself causes the violation.
>
> . . .
>
> . . .Responsibility for Consalvo's acts, deplorable as they were, rests squarely on his own shoulders. We recognize that Consalvo's illegal acts cost Smith his job, but relief against the city is beyond our grasp on the grounds asserted.
>
> 413 Mass. at 617-8, A. 15-16

The petitioner submits that the holding of the Massachusetts Supreme Judicial Court does not comport with the holdings of this Court.

Reasons for Granting the Writ.

I. THE DECISION OF THE MASSACHUSETTS SUPREME JUDICIAL COURT CREATES A CONSTITUTIONALLY UNJUSTIFIABLE DISTINCTION BETWEEN "ACQUIESCENCE" AND "RATIFICATION".

The petitioner submits that the holding of the Massachusetts Supreme Judicial Court creates a dangerous precedent, allowing for precisely the danger of a municipality insulating itself from liability under 42 U.S.C. § 1983 for unconstitutional political actions that were warned about by Justice O'Connor in *St. Louis v. Praprotnik*, 485 U.S. 112 (1988) where she wrote that:

> . . . [S]pecial difficulties can arise when it is contended that a municipal policymaker has delegated his policymaking authority to another official. 475 U.S., at 482-483, and n.12. If the mere exercise of discretion by an employee could give rise to a constitutional violation, the result would be indistinguishable from respondeat superior liability. If, however, a city's lawful policymakers could insulate the government from liability simply by delegating their policymaking authority to others, § 1983 could not serve its intended purpose.
>
> (485 U.S., at 126)
>
> . . . [T]he authority to make municipal policy is necessarily the authority to make final policy. 475 U. S., at 481-484. When an official's discretionary decisions are constrained by policies not

> of that official's making, those policies, rather than the subordinate's departures from them, are the act of the municipality. Similarly, when a subordinate's decision is subject to review by the municipality's authorized policymakers, they have retained the authority to measure the official's conduct for conformance with their policies. If the authorized policymakers approve a subordinate's decision and the basis for it, their ratification would be chargeable to the municipality because their decision is final.
>
> (485 U.S., at 127)

Here, we have a case where that review *was* exercised, and the unconstitutional firing was allowed to stand. Justice O'Connor's opinion walked a tightwire between excessive attribution of liability and excessive immunity for the acts of subordinates. The opinion of the Massachusetts Supreme Judicial Court leans too far to the side of immunity.

The First Circuit has already held, in *Bordanaro, et al. v. McLeod, et al.*, 871 F.2d 1151 (1st Cir. 1989), that municipal liability can be imposed in the presence of constructive notice on the part of the policymaker of unconstitutional practice, followed by "'supervisory encouragement, condonation and even *acquiescence*' in the unconstitutional practice." (at 1157) [*Emphasis added.*] Here we had not constructive notice but actual notice, based upon personal review.

If it is required for municipal liability that the municipal policymaker explicitly recite agreement with the unconstitutional decision, as the Massachusetts Supreme Judicial Court here seems to see as

the missing element, the result is to impose a requirement of facial invalidity rejected by the holdings of this court, including *City of Canton, Ohio v. Harris, et al.*, 489 U.S. 378, 386-387 (1989), which imposed liability for "deliberate indifference" to violations of constitutional rights.

Under the decision of the Massachusetts Supreme Judicial Court, the method for getting away with political firings is simple: let your subordinates do it, uphold them when they do, but don't get your hands dirty by explicitly saying that you agree. That result cannot be reconciled with the holdings of this Court.

Conclusion.

Certiorari should issue to review the decision of the Massachusetts Supreme Judicial Court.

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Appendix to Petition for Writ of Certiorari

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Appendix.

COMMONWEALTH OF MASSACHUSETTS

SUPREME JUDICIAL COURT FOR THE COMMONWEALTH

SJC-5998

Lincoln E. Smith v. City of Boston.

[413 Mass. 607]

October 5, 1992, Argued

November 5, 1992, Decided

Paul L. Nevins (Philip R. Olenick with him) for the plaintiff.

Susan M. Weise, Assistant Corporation Counsel (Gerard A. Pugsley, Assistant Corporation Counsel, with her, for the defendant.

Before Liacos, C.J., Abrams, Nolan, Lynch, & Greaney, JJ.

NOLAN, Justice.

For the first time we consider whether a municipal corporation is liable under 42 U.S.C. § 1983 (1988) for an unconstitutional act of one of its officials.[1] On

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[1] The Appeals Court has, however, touched on the issue. See *Ossinger v. Newton*, 26 Mass. App. Ct. 831, 833-834 (1989).

the facts presented, we agree with the allowance of the motion of the city of Boston (city) for a directed verdict.

From 1977 to 1980, the plaintiff, Lincoln E. Smith, worked as an administrative assistant to a member of the city council (city councillor). From 1982 through June, 1986, Smith was employed as the coordinator of the student employment program by the city. In April, 1986, the mayor of Boston appointed Robert W. Consalvo as director of the office of personnel management for the city of Boston (director).[2] Consalvo's appointment became effective June 1, 1986, but he immediately assumed the duties and responsibilities of the position. As director, Consalvo was "responsible for the personnel actions of all the [city] employees except those in the school department."[3] Consalvo testified that his primary responsibility was the "hiring and firing" of employees and "the procedures dealing with personnel policy and the like."

Almost immediately after Consalvo became director he began to "harass" Smith because of Smith's association with a city councillor. Consalvo's "harassment" escalated to disparate treatment and

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[2] Consalvo's position is also referred to as supervisor of personnel.

[3] Consalvo testified that the mayor had hired him "to take over [the] department and restructure it into a modern office of personnel management."

intimidation.[4] On June 23, 1986, less than one month after his appointment as director became effective, Consalvo fired Smith.[5] Following termination, Smith requested a meeting with the mayor. The meeting was held on June 30, 1986. Smith, Consalvo, the mayor, and the city councillor were present. Smith testified that he recounted at the June 30 meeting the circumstances leading to his termination. Smith further testified that the mayor

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[4] Smith testified that on one occasion Consalvo said to him, "If [the city councillor] wants you employed by the City of Boston, it is not going to be in this department. I suggest that you look elsewhere."

As for the disparate treatment, Smith testified that Consalvo moved him from his North Street office to City Hall, required Smith to submit daily activity reports not required of other employees, and challenged Smith's attendance record.

[5] Consalvo asserted that he properly fired Smith for failing to turn in a daily report on Friday, June 20. Smith testified, however, that he prepared the report in the late afternoon and went to Consalvo's office to turn it in at 4:46 P.M. Outside Consalvo's office, Smith said he was met by one of Consalvo's administrative assistants, who informed Consalvo of Smith's arrival and reported back to Smith that Consalvo would be with him shortly.

After waiting until 5:30 P.M. for Consalvo to come out of his office and accept the report, Smith departed for the weekend and left the report on his own desk. On Monday morning, June 23, 1986, Consalvo summoned Smith into his office and terminated him for failing to turn in the activity report.

said "that things would be taken care of," and that "he [the mayor] knew exactly where [Smith] was coming from." Smith testified that the mayor promised to get back in touch with him. The mayor responded by way of his executive assistant who told Smith that "there was a position available at the Boston police department in the personnel unit," and that they would transfer him if he applied for the position.

Thereafter, Smith brought suit against Consalvo, individually and in his capacity as director of personnel, and the city claiming, pursuant to 42 U.S.C. § 1983, and G. L. c. 12, § 11I (1990 ed.), that Consalvo and the city violated his right to be free of reprisals for political association and affiliation guaranteed by the Massachusetts Declaration of Rights and the United States Constitution. At trial, following presentation of the plaintiff's case-in-chief, the trial judge granted the city's motion for a directed verdict on the State and Federal civil rights claims.[6] The matter of Consalvo's individual liability was submitted to the jury. On a special verdict, the jury found that Consalvo violated Smith's civil rights secured by the Massachusetts Declaration of Rights

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[6] The judge also granted the city's motion for a directed verdict on Smith's claims that the city violated its contract with him and negligently failed to prevent Consalvo from engaging in the described course of conduct, and Consalvo's motion for a directed verdict on Smith's claims of intentional infliction of emotional distress and interference with advantageous relations.

and the United States Constitution, and awarded Smith $137,000 in compensatory damages and $5,000 in punitive damages. Consalvo is not a party to this appeal.

Smith now appeals from the judge's grant of a directed verdict on the Federal civil rights claim brought against the city asserting, in essence, that Consalvo's unconstitutional act is attributable to the city.[7] In pressing this appeal Smith seeks reinstatement to his prior position. We transferred the matter from the Appeals Court on our own motion.

On the basis of *Monell v. Department of Social Servs. of the City of N.Y.*, 436 U.S 658 (1978), and its progeny, we conclude that Smith has failed to demonstrate that Consalvo's unconstitutional acts are attributable to the city for the purposes of imposing municipal liability under 42 U.S.C. § 1983. Accordingly, we affirm the judge's grant of a directed verdict on the § 1983 count.

The starting point for our discussion is § 1983. It provides: "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of

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[7] Smith's notice of appeal also included a reservation of the judge's grant of a directed verdict on the State civil rights claim. Smith, however, failed to raise the argument in his brief and has presumably abandoned this claim. See Mass. R.A.P. 16(a)(4), as amended, 367 Mass. 921 (1975).

any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . ." In *Monell v. Department of Social Servs. of the City of N.Y.*, supra at 663, the United States Supreme Court first held that local government units were "persons" as that term is used in 42 U.S.C. § 1983. This decision rendered municipalities amenable to suit under § 1983 for wrongs caused through "a policy statement, ordinance, regulation, or decision officially adopted and promulgated" by that municipality. *Id.* at 690. Not limiting its pronouncement to formal acts of government, the *Monell* Court stated that § 1983 authorizes suit "for constitutional deprivations visited pursuant to governmental 'custom' even though such a custom had not received formal approval through the body's official decisionmaking channels." *Id.* at 690-691.

Further defining the reach of municipal liability under § 1983, the *Monell* Court rejected respondeat superior as a basis of imposing liability on a municipality for the unconstitutional act or acts of one of its officers or employees.[8] The *Monell* Court stated

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[8] The *Monell* Court noted that the primary basis for its conclusion was the legislative history of the act which disclosed that Congress questioned "its constitutional power to impose such liability in order to oblige municipalities to control the conduct of others." See *Pembaur v. Cincinnati*, 475 U.S. 469, 479 (1986), citing *Monell v.*

(continued...)

that a municipality could be held liable only when its "lawmakers or those whose edicts or acts may fairly be said to represent official policy" cause the constitutional harm. *Id.* at 694.

Following *Monell*, the Supreme Court set out to clarify the circumstances under which an act or acts of a government official represent official policy. See Blum, *Monell, DeShaney, and Zinermon:* Official Policy, Affirmative Duty, Established State Procedure and Local Government Liability Under Section 1983, 24 Creighton L. Rev. 1, 15-23 (1990). In *Pembaur v. Cincinnati*, 475 U.S.469, 480 (1986), a plurality of the Court stated that "municipal liability may be imposed for a single decision by [a] municipal policymaker[ ] under appropriate circumstances." One of the appropriate circumstances cited was the instance where "the decisionmaker possesses final authority to establish municipal policy with respect to the action ordered." *Id.* at 481. The question whether a decision maker possesses "final

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[8](...continued)
Department of Social Servs. of the City of N.Y., 436 U.S. 658, 665-683 (1978).

Additional support for the proposition that § 1983 could not be interpreted to impose vicarious liability on a local governmental unit is the language of the statute itself. See 42 U.S.C. § 1983 (statute imposes liability on a person who "subjects or causes to be subjected" any individual to a deprivation of Federal rights). See also *Department of Social Servs. of the City of N.Y., supra* at 692.

policymaking authority," the Court stated, is a question of State law.[9] *Id.* at 483.

In *St. Louis v. Praprotnik*, 485 U.S. 112, 127 (1988), the Court stated: "When an official's discretionary decisions are constrained by policies not of that official's making, those policies, rather than the subordinate's departures from them, are the act of the municipality. . . . If the authorized policymakers approve a subordinate's decision and the basis for it, their ratification would be chargeable to the municipality . . . ."

Based on these developments in the Supreme Court's line of post-*Monell* decisions, Lincoln Smith, the plaintiff here, advances three theories under which Consalvo's unconstitutional acts are attributable to the city for the purposes of establishing § 1983 liability. First, Smith argues that Consalvo, as director, possessed "final policymaking authority." Second, Smith argues that the mayor's alleged delegation of "policy making authority" to Consalvo necessarily constituted de facto municipal policy having the force and effect of law. Third, Smith argues that, if Consalvo did not possess final policy making authority, the mayor ratified Consalvo's decision by his actions taken subsequent to the termination. We take up each argument in turn.

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[9] In *St. Louis v. Praprotnik*, 485 U.S. 112, 124 n.1 (1988), the Court noted that State law may include State and "local positive law as well as custom or usage having the force of law."

Appendix.

Smith asserts that Consalvo, as director, was the official responsible for establishing final policy with respect to personnel matters in the city and therefore Consalvo's acts are attributable to the city. While we have little difficulty concluding that Consalvo's position comes with trappings of authority and discretion as to matters of a managerial nature, we see no basis for the conclusion that the director (or supervisor) of personnel possesses final policy making authority with regard to the complained-of actions. We conclude that the director (or supervisor) of personnel is bound by policies enunciated by the mayor, and as such, these policies, and not Consalvo's abusive departure from them, serve as our benchmark for determining municipal liability.

We find support for our conclusion in the Revised Ordinances of the City of Boston. They present the mayor as the chief executive officer supported, in the administration of government, by the administrative services board (board). City of Boston Code, Ordinances, Title 5, § 5-1.1 (as amended, 1991) (amendments not germane for purposes referred to herein). The board is under the charge of the director of administrative services who serves as the chairman of the board. *Id.* at §§ 5-1.1, 5-1.2. The supervisor of personnel serves as a board member under the director of administrative services. *Id.* at §§ 5-1.1, 5-1.6.

The ordinances describe the duties of the director of administrative services as one who is to "make, under the Mayor, studies and recommendations with respect to the organization, activities, policies

and procedures of all Departments, Boards and officers so that the administration thereof shall be economical and efficient" (emphasis added). *Id.* at § 5-1.2. Thus, even the director of administrative services, who chairs the board overseeing the function of numerous departments, including Consalvo's, is not empowered to make final policy but merely makes recommendations to the mayor. Further, the duties of the supervisor of personnel described in the ordinances do not include responsibility for establishing final policy with respect to personnel matters.[10]

Given this organizational structure, it is clear that the mayor, not the director (or supervisor) of per-

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[10] In pertinent part, § 5-1.6 of the revised ordinances describes the duties of the supervisor of personnel: "The Supervisor of Personnel shall: a. Establish and maintain personnel records, as complete as practicable, for all persons in the service of the City; b. Make a continuing study of personnel problems, employment conditions and economic changes affecting the several departments of the City; c. Recommend, from time to time to the Mayor and the several officers appointing subordinates, programs designed to provide opportunities for career service within the City and administrative policies tending to improve and coordinate the handling of personnel matters . . .; and d. Supervise the administration of all compensation plans established for employees of the City and recommend such changes in those plans as from time to time shall seem to him necessary or advisable . . . ."

sonnel, is the final policy making authority. While not completely outside the inner circle of policy makers, the director of personnel's policy making role is, at most, an advisory one.

Our conclusion is supported by the numerous executive orders and policy statements issued by the mayor's office governing personnel matters presented at trial.[11] One such document is the Executive Employment Policy Manual (manual) adopted by executive order of the mayor, March 9, 1983. Section I(D) of the manual sets forth the city's general employment policy: "The Affirmative Action goals of the City of Boston are to provide fair and equal employment opportunities for employees and applicants for employment on the basis of individual merit and fitness as ascertained through fair and practical methods of selection and promotion . . . with proper regard for their . . . constitutional rights as citizens." Section I(B) of the manual, entitled "Coverage of this Policy," provides that "any changes to said plan must be approved by the Mayor . . . and the Supervisor of Personnel" (emphasis supplied).

Further, the manual provides at various points that the supervisor of personnel is responsible for administering, maintaining, reviewing, and implementing various aspects of the personnel management plan. See, e.g., *id.* at § III(B). Indeed, the responsibilities of the supervisor of personnel delin-

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[11] Noteworthy is the absence of any policy statement or memorandum issued by Consalvo purporting to be a final policy statement on a relevant subject.

eated at various points in the manual belie the conclusion that one occupying the position possesses final policy making authority with regard to personnel matters and support the city's claim that someone other than Consalvo possessed final policy making authority with regard to these matters.

While the responsibilities of the supervisor of personnel as detailed in the ordinances and other city documents considered fail to describe one vested with final policy making authority, our conclusion here is based only on positive local law. The question whether Consalvo possessed final policy making authority as a matter of practice, or through custom and usage, is next considered.

For his second theory, Smith argues that the mayor delegated final policy making authority to Consalvo at the time Consalvo was appointed. Smith asserts that this delegation rendered the city liable for Consalvo's act because Consalvo's decision to terminate Smith necessarily constitutes "policy," despite the fact that Consalvo's practice was not authorized by law. Generally, Smith relies on the principle that the mayor's delegation and Consalvo's subsequent action constitute "custom and usage," having the force and effect of law thereby exposing the city to liability for Consalvo's actions.

In support of this proposition, Smith points to the conversation Consalvo had with the mayor at the time of his appointment and Consalvo's trial testimony. The mayor, in Consalvo's words, said that he had hired Consalvo to take over that office and "restructure it into a modern office of personnel management." Consalvo testified that he understood that

he was "responsible for the personnel actions of all of the employees . . . and . . . the hiring and firing and the procedures dealing with personnel policy and the like." Further, Consalvo testified that he was not required to follow the previous director's policies and regulations in running the office.

Municipal liability for governmental custom or practice falling short of a formal government act under § 1983 is well established, see *Monell v. Department of Social Servs. of the City of N.Y.*, 436 U.S. 658, 690-691 (1978), but Smith misconstrues its application. Governmental custom does not go to the propriety of a delegation of decision making authority, but rather to the existence of a widespread practice that, although not authorized by written law or express municipal policy, is "so permanent and well settled as to constitute a 'custom or usage' with the force of law." *St. Louis v. Praprotnik*, 485 U.S. 112, 127 (1988), quoting *Adickes v. S.H. Kress & Co.*, 398 U.S. 144,167-168 (1970).

To carry the day on the "custom" argument, the plaintiff must establish a pattern of occurrences or a practice similar to that experienced by him, but not necessarily induced by Consalvo, so as to rise to the level of custom thereby having the force and effect of law. Smith has cited no incidents that support such a conclusion. Smith cites only the language of the mayor's instruction: a charge that arguably does not extend beyond the scope of responsibilities defined in the city ordinances and the manual.[12] According-

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[12] Smith relies on Consalvo's statement that, in assum- (continued...)

ly,we conclude that Consalvo's hiring and firing authority was constrained by overarching municipal policies. See *St. Louis v. Praprotnik*, supra at 127. Consalvo's decision to terminate Smith was an abuse of discretion failing to rise to the level of governmental custom or practice having the force and effect of law.

Corollary to the second theory, Smith advances the argument that a failure to hold the city liable in this instance will lead to "egregious attempts by local governments to insulate themselves from liability" by allowing, and perhaps encouraging, subordinates to carry out unconstitutional acts. *St. Louis v. Praprotnik*, supra at 127. While this argument does have appeal, the argument must fail. First, for the reasons noted above, egregious attempts by a munic-

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[12](...continued)
ing the position, he was not required to follow the previous director's "policies and regulations." Smith reads this use of the term "policies" as vesting final policy making authority in Consalvo. Smith's interpretation bears little resemblance to the context in which the remark was made and the mayor's motivation for hiring Consalvo. The mayor appointed Consalvo to restructure the office of personnel management, an office that lacked modern efficiency. The administrative problems which existed in the office were presumably, at least in part, attributable to the manner in which Consalvo's predecessors managed the office. It is more likely, in our view, that the term "policies and regulations" in this context referred to "department policy" and concerned departmental procedures and administrative practices.

ipality to avoid liability are actionable as de facto municipal policy (custom or usage) having the force and effect of law. *Id.* Second, imposing liability on the municipality for what we view as an abuse of discretion would, without more, be virtually indistinguishable from respondeat superior, a basis of § 1983 liability that the Supreme Court of the United States has rejected.

On his third theory, Smith argues that the mayor ratified Consalvo's unconstitutional acts in failing to overrule them after he was advised of their occurrence at the meeting on June 30. We find no merit to this argument.

We assume for the purposes of discussion that Consalvo's act would be attributable to the city if the mayor is found to have ratified Consalvo's decision. We note that Smith produced no evidence showing that the mayor approved of Consalvo's decision and the basis for it prior to Smith's termination. The only evidence tending to support this ratification theory is Smith's description of the circumstances leading to his termination at the June 30 meeting and the mayor's subsequent promise "that things would be taken care of." Assuming, for the moment, that the correct point in time for inquiry is after termination,[13] the record does not support the conclusion that the mayor ratified Consalvo's decision

---

[13] We express no opinion on the issue whether ratification must occur before the complained-of act occurs. See *Looney v. Wilmington*, 723 F. Supp. 1025, 1036-1037 (D. Del. 1989).

and the basis for it. The circumstances lead us to the conclusion that the mayor, at most, acquiesced in Consalvo's decision. Mere acquiescence in a subordinate's decision will not subject the municipality to liability because the governmental policy itself causes the violation.

In conclusion, we cannot say that Consalvo's acts are attributable to the city under 42 U.S.C. § 1983. Smith failed to show that Consalvo possessed final policy making authority with respect to the complained-of activities and failed to demonstrate the existence of a municipal policy, express or implied, that caused the constitutional harm. The authority to act for the city does not necessarily grant license to establish final policy. Responsibility for Consalvo's acts, deplorable as they were, rests squarely on his own shoulders. We recognize that Consalvo's illegal acts cost Smith his job, but relief against the city is beyond our grasp on the grounds asserted.

Accordingly, we find no error in the trial judge's grant of the city's motion for a directed verdict on the Federal civil rights claim.

Judgment affirmed.

Appendix.

COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT FOR THE COMMONWEALTH

AT BOSTON, November 5, 1992

IN THE CASE NO. SJC-5998

LINCOLN E. SMITH

vs.

CITY OF BOSTON

pending in the Superior Court Department of the Trial Court for the County of Suffolk No. 87-6755
ORDERED, that the following entry be made in the docket; viz.,—

Judgment affirmed.

BY THE COURT,

Jean M. Kennett, CLERK.

November 5, 1992
See opinion on file.

Appendix.

Appendix.

COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT FOR THE COMMONWEALTH

ORDER

It is hereby Ordered, that the following appeal, now pending in the Appeals Court, be transferred, sua sponte, to the Supreme Judicial Court for the Commonwealth:

Appeals Court No. 91-P-1457

LINCOLN E. SMITH
vs.
CITY OF BOSTON & another

By the Court,

Jean M. Kennett
Jean M. Kennett, Clerk

Entered: June 18, 1992

Appendix.

NOTIFIED: 12/5/90(ALS)
R.L. J.I.M.c.c.
S.W. a.c.c.
M.M.a.c.c.

N.B. FOR CLERK'S USE ONLY
JUDGMENT ENTERED ON DOCKET DEC. 5, 1990
PURSUANT TO MASS.R.CIV.P.58(a) AND NOTICE
SENT TO PARTIES PURSUANT TO
MASS.R.CIV.P.77(d) AS FOLLOWS:

* *

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPERIOR COURT
DEPARTMENT OF
THE TRIAL
COURT
CIVIL ACTION

NO. 87-6755

LINCOLN E. SMITH PLAINTIFF(S)
v.
ROBERT W. CONSALVO DEFENDANT(S)
INDIVIDUALLY & AS
DIRECTOR OF PERSONNEL MANAGEMENT
FOR THE CITY OF BOSTON AND
THE CITY OF BOSTON

JUDGMENT
(ON DIRECTED VERDICT)
(FOR DEFT. CITY OF BOSTON)
PURSUANT TO MASS.R.CIV.P.50(a)

Appendix.

THIS ACTION CAME ON TO BE HEARD BY THE COURT, GREENBERG, J., PRESIDING, AND WAS TRIED TO A JURY. AT THE CLOSE OF - *THE PLAINTIFF'S EVIDENCE -- THE DEFENDANT(S) CITY OF BOSTON MOVED FOR A DIRECTED VERDICT ON CTS. 1,2,4, & 5, WHICH MOTION THE COURT ALLOWED; AND, THEREFORE, IT IS ORDERED AND ADJUDGED:

THAT THE PLAINTIFF(S) LINCOLN E. SMITH TAKE NOTHING BY THE COMPLAINT ON SAID COUNTS AND THAT THE ACTION BE AND HEREBY IS DISMISSED ON SAID COUNTS.

DATED AT BOSTON, MASSACHUSETTS THIS 29th DAY OF NOVEMBER, 1990

MICHAEL JOSEPH DONOVAN,
CLERK OF COURT

FORM OF JUDGMENT APPROVED:

MLG
JUSTICE OF THE SUPERIOR COURT
DEPARTMENT

By: *Christine M. Mackay*
FIRST ASSISTANT
CLERK/MAGISTRATE

*Strike Inapplicable Words.
Form Civ.P.56 (2nd Rev.) 10-78 500

Supreme Court, U.S.
FILED
MAR 3 1993
OFFICE OF THE CLERK

No. 92-1356

IN THE

Supreme Court of the United States

October Term, 1992

LINCOLN E. SMITH,

Petitioner,

v.

CITY OF BOSTON,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO
THE SUPREME JUDICIAL COURT OF
THE COMMONWEALTH OF MASSACHUSETTS

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

RESPONDENT CITY OF BOSTON
By its attorney
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March 3, 1993

BATEMAN & SLADE, INC BOSTON, MASSACHUSETTS

Question Presented

Whether the evidence supported the determination by the Superior Court and the Supreme Judicial Court of the Commonwealth of Massachusetts that a subordinate's isolated decision to terminate petitioner in violation of municipal policies was an abuse of discretion and not a decision that was reflective of municipal policy when there was no evidence presented to show that the municipal policymaker ratified the decision and the basis for it, other than the fact that petitioner informed the Mayor of the termination sometime after the fact and the Mayor did not overturn the decision.

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No. 92-1356

IN THE

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CITY OF BOSTON,

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ON PETITION FOR WRIT OF CERTIORARI TO
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THE COMMONWEALTH OF MASSACHUSETTS

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Opinions Below

The Opinion of the Supreme Judicial Court of the Commonwealth of Massachusetts is reported at 413 Mass. 607 (1992) and is reproduced in the Appendix to the Petition (A-1, A-16).

Jurisdiction

Petitioner has invoked the jurisdiction of this Court under 28 U.S.C. § 1257(a) and respondent is satisfied with this statement of jurisdiction except to point out that the date of the entry of judgment of the state court case petitioned to be reviewed is November 5, 1992.

Statement of the Case

Respondent is satisfied with the petitioner's statement of the case insofar as it is quoted verbatim from the state decision. Respondent would add that at the close of the petitioner's evidence, the trial judge granted the respondent's Motion For Directed Verdict. Further, at the close of all evidence, petitioner presented a written motion for reconsideration of the trial judge's allowance of directed verdict in the respondent's favor, which was denied. Petitioner also filed a motion for a new trial to reconsider the allowance of the directed verdict. That motion was denied.

Petitioner timely filed an appeal of his Federal and State civil rights claims to the Appeals Court of the Commonwealth of Massachusetts and the Supreme Judicial Court transferred the appeal *sua sponte* (A-19). The State civil rights claims were deemed to be abandoned by petitioner as he failed to raise the argument in his appellate brief (A-5). Judgment was affirmed for the City (A-17).

Reasons for Denying the Writ

PETITIONER PRODUCED NO EVIDENCE TO SHOW THAT THE MUNICIPAL POLICYMAKER, THE MAYOR, RATIFIED AN ISOLATED DISCRETIONARY DECISION OF A SUBORDINATE TO TERMINATE THE PETITIONER IN VIOLATION OF MUNICIPAL POLICY AND RATIFIED THE BASIS FOR THAT DECISION.

The petitioner has improperly characterized the evidence presented at trial in an effort to challenge the legal basis of the verdict below. The decision of the Massachusetts Supreme Judicial Court is entirely consistent with the legal principles enunciated in this Court's cases dealing with municipal liability under 42 U.S.C. § 1983.

Thus, neither federal nor constitutional law will be advanced by having this Court review such determinations.

Despite the petitioner's effort to portray this case as one in which the municipality was able to insulate itself from liability in spite of a delegation of authority and a review by the final policymaker of the subordinate's decision, the facts show that there was no delegation of final policymaking authority nor did the Mayor as final policymaker ratify the decision to subject the municipality to liability (A. 3, A. 9-A-12).

"Municipal liability attaches only where the decisionmaker possesses final authority to establish municipal policy with respect to the action ordered. The fact that a particular official — even a policymaking official — has discretion in the exercise of particular functions does not, without more, give rise to municipal liability based on an exercise of that discretion." *Pembaur* v. *Cincinnati*, 475 U.S. 469, 481 (1986).

Petitioner inaccurately states that there was a delegation of authority to hire and fire from the final policymaker to his subordinates. However, using the standard articulated in *St. Louis* v. *Praprotnik*, 485 U.S. 112 (1988), of looking to state and local laws to determine who is the final policymaker, the Supreme Judicial Court held that based on the city's ordinances and written city policies, there was no question that the Mayor had final policymaking authority in the area of personnel selection and the supervisor of personnel had at most an advisory role. While the supervisor of Personnel had the discretion to hire and fire, his authority was nevertheless constrained by municipal policies (including an Executive Employment Manual). *Smith* v. *City of Boston*, 413 Mass. 607, 614 (1992); *see Pembaur* v. *Cincinnati*, 475 U.S. 469, 483 n.12 (1986). Thus, there was no delegation of authority.

The petitioner then seeks to persuade this Court that the meeting held seven days after the termination was a ratification of the basis for the decision to terminate under *Praprotnik*.

"42 U.S.C. § 1983 imposes liability only on a person who subjects or causes to be subjected any individual to a deprivation of federal rights. This cannot easily be read to impose liability vicariously on government bodies solely on the basis of the existence of an employer-employee relationship with a tortfeasor." *Pembaur* v. *Cincinnati*, 475 U.S. at 478.

The mere fact that the municipal policymaker for respondent City of Boston [the Mayor] met with the petitioner, his City Councillor and Robert Consalvo [Supervisor of Personnel] seven days after petitioner's termination at petitioner's and the City Councillor's request is not the type of custom, policy or practice which subjected the petitioner to a deprivation of his constitutional rights, i.e., the loss of his job under *Monell* v. *Department of Social Services of the City of New York*, 436 U.S. 658 (1978).

Nor can this meeting remotely be deemed a ratification of the subordinate's decision and the basis for it. There is no evidence to support plaintiff's undocumented assertion that the Mayor "reviewed" the decision to terminate. The only evidence presented to the lower court which the Supreme Judicial Court of Massachusetts cited in its decision was that a meeting took place and that one of the Mayor's executive assistants told petitioner that there was another municipal job available if he applied for it (A. 4).

These facts show at best that the Mayor failed to investigate the decision and simply went along with it. The failure to investigate one termination by a subordinate does not make an "official municipal policy" subjecting the municipality to liability, especially where, as here, the Supreme Judicial Court determined the subordinate's "illegal acts to be deplorable and to rest squarely upon his own shoulders." *Smith* v. *City of Boston*, 413 Mass. 607, 617; *see St. Louis* v. *Praprotnik*, 485 U.S. at 130.

There was no evidence that the Mayor approved of the basis of the decision. Granting petitioner's and the City Councillor's

request to meet with him should not automatically be deemed ratification without more, for then the situation would be created where anything the chief policymaker did or did not do would be deemed a review and ratification if the subordinate's position was not changed to the complainant's satisfaction. Arguably, the petitioner could have brought this same petition before this Court if the Mayor had denied his request for a meeting, deeming the denial to constitute a ratification of the decision. Petitioner is thus seeking the Court to find municipal liability on any action undertaken by the Mayor other than overturning the decision to terminate him, or respondent superior.

This point has previously been addressed by this Court:

> In virtually every instance where a person has had his or her constitutional rights violated by a city employee, a § 1983 plaintiff will be able to point to something the city could have done to prevent the unfortunate incident . . . thus resulting in *de facto respondeat* superior liability on municipalities.

Canton v. *Harris*, 489 U.S. 378, 392 (1989); *see also Oklahoma City* v. *Tuttle*, 471 U.S. 808, 823 (1985) ("Obviously, if one retreats far enough from a constitutional violation, some municipal policy can be identified behind almost any such harm inflicted by a municipal official").

In addition, the element of causation between the meeting with the Mayor and petitioner's termination is totally lacking.

> In order to subject the municipality to liability, the government policy must in and of itself cause the violation . . . it is only when the execution of the government's policy or custom inflicts the injury that the municipality may be held liable under § 1983.

Canton v. *Harris*, 489 U.S. 378, 385 (1989); *see also Praprotnik*, 485 U.S. at 122 ("governments should be held responsible when, and only when, their official policies cause their employees to violate another person's constitutional rights").

The plaintiff has shown no nexus between the event at issue [his termination] and a meeting with the Mayor post termination. The Mayor did not terminate the plaintiff or give prior approval to his termination. The most that can be said is that the Mayor became aware of his subordinate's decision and acquiesced by not intervening, which does not implicate municipal liability under *Pembaur* or *Praprotnik*.

Since *Monell*, the Supreme Court has emphasized that the "subjects or causes to be subjected" language of 42 U.S.C. § 1983 requires that the governmental policy must be so tied to the challenged acts that it can be said to be the "moving force of the constitutional violation." *Bibbo* v. *Mulhern*, 621 F.Supp. 1018, 1027 (D. Mass. 1985), *citing City of Oklahoma City* v. *Tuttle*, 471 U.S. 808, 823 n.8 (1985).

It is also important to note in *Pembaur* that the policy complained of arose when defendant employees directly sought explicit orders and instructions from the supervisor on forcibly entering a health clinic without a warrant to arrest two occupants. *Pembaur*, 475 U.S. at 473. Such was not the case here, as the subordinate's actions were taken without the Mayor's prior knowledge. *See also Melton* v. *City of Oklahoma City*, 879 F.2d 706, 725 (10th Cir. 1989) (City was held liable for ratification when the termination was discussed with and approved by the Mayor prior to its occurrence).

The *Bordanaro* case, cited by petitioner on page 8 of his petition wherein the municipality was held liable through the actions or inactions of its police chief and mayor, contains a vastly different scenario. In *Bordanaro*, the police supervisors admitted during testimony to an egregious custom and practice over decades, of "longstanding, widespread and facially uncon-

stitutional police practices" which led to an incident where the entire night shift of the city police department engaged in an episode of excessive force based on the longstanding customs. The court held that "constructive knowledge may be evidenced by the fact that the practices have been so widespread or flagrant that in the exercise of their official responsibilities, the municipal policymakers should have known of them." *Bordanaro* v. *McLeod*, 871 F.2d 1151, 1156-1157 (1st Cir. 1989).

The evidence presented in *Smith* v. *Boston* falls far short of the outrageous facts of *Bordanaro*. As the Court stated, petitioner cited no other incidents but his own such that no pattern or custom of similar occurrences was established. *Smith*, 413 Mass. at 616. Thus, no constructive knowledge could be imputed to the Mayor.

It is thus clear that there was no evidence presented by the petitioner in his case to show that the chief policymaker, hence the municipality, caused his termination.

Conclusion.

For all of the above reasons, this Court should deny the petition for writ of certiorari.

Respectfully submitted,

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